The Continuing Path to Local Competition:

The Importance of Section 252 to Achieving Just and Reasonable Terms, Conditions and Prices for UNE-P

The recent decision by the DC Circuit Court of Appeals has created uncertainty that can only be put to final rest by the Supreme Court providing definitive guidance as to how the unbundling provisions of section 251 of the 1996 federal Telecom Act ("Act") are to be implemented.[1] In the meantime, however, regulators have encouraged carriers to negotiate agreements that enable local competition to continue on commercially reasonable terms.[2]

The purpose of this white paper is to explain how state commissions can respond constructively to the uncertainty created by the DC Circuit in a manner that respects ongoing negotiations. In our view, one of the most critical steps is for state commissions to adhere to the clear requirement of section 252 of the Act that agreements addressing interconnection and network element offerings be filed with state commissions for approval. Such agreements provide the very foundation upon which local competition is built and it is essential that they are non-discriminatory in design and effect, which is the fundamental role of section 252 of the Act.

In addition to those agreements voluntarily reached between carriers, the RBOCs also voluntarily committed to the additional obligations listed in section 271 in return for the right to provide in-region long distance service. As of the end of 2003, the RBOCs provided long distance service to more than 37 million lines (in contrast to the 15 million UNE-P lines earned by competitors).[3] As everyone knew when the Act became law, the

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[1] *United States Telecom Association v. FCC*, No. 00-1012 (D.C. Cir. March 2, 2004) ("*USTA II*").

[2] We note at the outset that whether or not such agreements are achieved has little to do with whether *USTA II* should be reviewed by the Supreme Court. To begin, *USTA II* undermines the important role of state commissions in overseeing the competitive development of local telecommunications markets, an issue that transcends the relatively narrow (by comparison) issue of impairment. In addition, however, the Act was intended to reduce barriers to entry in perpetuity, not just enable select entry by those firms that happened to exist at the time of its passage or came into being immediately thereafter. Such a view ignores the importance of the "competitor not yet formed" that was also granted the legal right (if impaired) to access the network to offer its innovation in the future. Commercial negotiations between today's carriers (even if successful) does not lessen the need to ensure that future carriers' rights are correctly defined and protected, an outcome that can only be achieved by Supreme Court review and reversal of *USTA II*.

[3] Data as of 4Q2003 (Source: RBOC Quarterly Earnings Statements). In addition, in the first state in which RBOC long distance entry was allowed (New York), the RBOC has already achieved 61% long distance market share, just shy of the share AT&T had when it was still considered a dominant, and fully-regulated, long distance carrier. The only counter-balance to the RBOCs achieving complete dominance offering bundled services is the local competition made possible by access to network elements.

RBOCs' ability to bundle local and long distance services is the most powerful force ever unleashed in the telecommunications marketplace. Until now, it was unnecessary to define with precision the exact terms, conditions and prices applicable to items required by section 271's competitive checklist because such obligations largely duplicated parallel obligations incorporated in the regulations implementing section 251. With the D.C. Circuit's vacatur of the FCC's unbundling rules under section 251 of the Act, however, state commissions may be asked to adjudicate disputes concerning the competitive checklist, at least where negotiations fail to produce commercially reasonable and nondiscriminatory offerings. As such, it is important that the states appreciate their important role resolving such disputes in accordance with section 252 of the Act.

Section 252 Review is Fundamental to Achieving Local Competition

The basic interconnection offerings – loops, switching, transport and interconnection – provide the foundation for local competition. For that competition to develop on a level playing field requires that access arrangements not discriminate among competitors.[4] Section 252 is a critical element in achieving that end in two ways. First, section 252 requires that interconnection agreements be filed with state commissions for approval, with the states directed to reject an agreement if: (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.[5] Second, section 252(i) requires the incumbent to offer any agreement to other carriers, thereby permitting market forces to place additional pressure on any discriminatory arrangements.

Significantly, the FCC has recognized the critical importance of section 252 and has addressed RBOC attempts to evade its disclosure, review and opt-in protections. In response to a request for a declaratory ruling by Qwest,[6] the FCC provided additional guidance as to the obligations created by section 252. Specifically, the FCC determined that section 252 creates a broad obligation to file agreements (subject to specific narrow exceptions),[7] and that the state commission should be the "first line" of defense against

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[4] It is even more critical that the access offered competitors not discriminate between entrant and incumbent, but that issue is beyond the limited purpose of this white paper.

[5] Section 252(e)(2)(A). In addition, a state commission may reject an agreement if it does not meet the requirements of section 251 (a factor less relevant to the present discussion).

[6] Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, *Memorandum Opinion and Order*, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

[7] Notably, Qwest specifically requested (among other requests) a finding that section 271 network elements were not required to be provided in filed interconnection agreements. Importantly, as explain in more detail in the following section, the FCC did not agree that section 271 elements were one of the specific exceptions to section 252's filing and arbitration obligations.

ILEC efforts to evade their obligations. As the FCC explained the findings reached by the *Qwest Declaratory Ruling:*

> We rejected this [Qwest's] "cramped reading" of section 252, noting that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions." Instead, we broadly construed section 252's use of the term "interconnection agreement," holding that carriers must file with state commissions for review and approval under section 252 any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation . . . ."[8]
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> The [*Qwest*] *Declaratory Ruling* noted some reasonable but narrow exceptions.… Such exceptions, however, flow from the general standard of ongoing obligations. Specifically, we found that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) do not have to be filed if the information is generally available to carriers. We stated that settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251 do not need to be filed. In addition, we found that forms completed by carriers to obtain service pursuant to terms and conditions of a underlying interconnection agreement do not constitute either an amendment to that agreement or a new interconnection agreement that must be filed under section 252. Finally, we held that agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court and that do not otherwise change the terms and conditions of the underlying interconnection agreement are not themselves interconnection agreements or amendments to interconnection agreements that must be filed under section 252(a).[9]

Moreover, the FCC held that the section 252 process is critical to detect and prevent discrimination, and fully appreciated the important role of state commissions in assuring that agreements are filed and available to carriers:

> Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it should be approved or

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[8] *Qwest NAL*, ¶ 11 (footnotes omitted, emphasis added).

[9] *Qwest NAL*, ¶ 23 (footnotes omitted).

> rejected…. The guidance we articulate today flows directly from the statute and serves to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval.[10]
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> …we believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements.[11]

With the footnote appended to the above passage further explaining:

> As an example of the substantial implementation role given to the states, throughout the arbitration provisions of section 252, Congress committed to the states the fact-intensive determinations that are necessary to implement contested interconnection agreements.[12]

In the *Qwest Declaratory Ruling*, the FCC made clear that any agreement addressing *ongoing* obligations pertaining to unbundled network elements – and the access and unbundling obligations of section 271 fall squarely within that definition – must be filed in interconnection agreements subject to section 252 and, to the extent any question remains regarding those obligations, that the state commissions are to decide the issue (at least in the first instance). This view is not surprising, as the FCC clearly understood the important role that section 252 – including section 252(i)[13] – plays in assuring that CLECs are aware of, and may opt into – the interconnection agreements of

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[10] *Qwest Declaratory Ruling*, ¶ 10.

[11] *Id*, ¶ 7.

[12] *Id*, ¶ 7, n. 23.

[13] 47 U.S.C. section 252(i). *See also* section 51.809(a) of the FCC's rules, 47 C.F.R. § 51.809(a), which provides:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

other carriers.[14] As the FCC noted, state review of interconnection agreements is vital: "Absent such a mechanism, "the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated . . . ."[15] Given the importance of section 252 to the detection and prevention of discrimination, any effort by an RBOC to evade these provisions should be dealt with swiftly and decisively, with Chairman Powell emphasizing "… that violations of the key pro-competitive provisions of the Act [i.e., section 252] will not be tolerated."[16]

Section 271 Requires Ongoing Access to Loops, Switching, Transport at Rates and Terms that are Just, Reasonable and Nondiscriminatory under Section 252

Congress well understood that undoing the AT&T Divestiture Agreement and permitting the RBOCs to offer in-region long distance services carried great risk. Consequently, in crafting the additional voluntary commitments that an RBOC must accept in order to offer in-region service, Congress made sure that each of the core elements of the local network – loops, transport, switching and signaling – would be available to competitive entrants. As the FCC explained:

> These additional requirements [the unbundling obligations in the competitive checklist] reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market…. The protection of the interexchange market is reflected in the fact that section 271 primarily places in each BOC's hands the ability to determine if and when it will enter the long distance market. If the BOC is unwilling to open its local telecommunications markets to competition or apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization.[17]

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[14] This view is consistent with long-standing FCC policy. The FCC noted in its initial *Local Competition Order* that:

> …requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15583, ¶ 167 (1996) (subsequent history omitted, emphasis in original) ("*Local Competition Order*").

[15] *Qwest NAL*, ¶ 20 (footnotes omitted).

[16] Statement of Chairman Michael Powell, *Qwest NAL*.

[17] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services*

The voluntary social contract contained in section 271 is both simple and powerful: In exchange for opening its *entire* network to competitors, the RBOC is permitted to provide long distance services to its local customers (and others).[18] Most relevant to our purposes here are the following elements of the competitive checklist that comprise the combination known as UNE-P:

> (B) COMPETITIVE CHECKLIST - Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: . . .
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> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
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> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
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> (vi) Local switching unbundled from transport, local loop transmission, or other services . . .
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> (x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.[19]

The FCC determined in the TRO that the additional obligations of the competitive checklist must comply with a *potentially* more liberal pricing standard than the standard that applies to elements offered under section 251 of the Act.[20] Specifically, network

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Offering Advanced Telecommunications Capability, CC Docket No. 98-147, "Report and Order and Order on Remand and Further Notice of Proposed Rulemaking," FCC 03-36, released August 21, 2003 ("TRO"), ¶ 655.

[18] As a practical matter, the RBOCs have generally chosen to focus their long distance offerings on their own local customers and have not engaged in out-of-region entry to any meaningful degree.

[19] Section 271(c)(2)(B).

[20] The fact that the FCC has adopted a pricing standard applicable to section 271 UNEs that is potentially more lax than its TELRIC rules does not necessarily mean that existing prices should be changed significantly, if at all. TELRIC-based UNE rates are just and reasonable in themselves and it is a fact-based economic question as to whether price levels different than the existing just and reasonable rates are appropriate. In this regard, it is important to understand that the economic issues that surround TELRIC pricing are, for the most part, unrelated to how the prices for local switching have been established. The principal RBOC objection to TELRIC pricing is the claim that it is not "…rooted in the real-world attributes of the existing network,

elements offered solely in order to comply with section 271 must be just, reasonable, nondiscriminatory and provide meaningful access:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[21]

As a threshold point, we observe that there has been some confusion created by the passage above. It is important to understand that the FCC did not conclude in the above paragraph that section 271 network elements were directly subject to sections 201 and 202 of the Act (which applies, as the FCC notes, to *interstate* services).[22] Rather, the FCC adopted the just and reasonable rate standard that "has historically been applied under most federal and state statutes," and noted that sections 201 and 202 are an embodiment of that traditional standard.[23] The paragraph is not a statement of jurisdiction (i.e., the paragraph does not say that section 271 network elements are interstate services *subject* to 201 and 202); rather, the passage is describing the appropriate standard of review.

Just as the FCC adopted the TELRIC pricing standard to apply to section 251 UNEs, the FCC has here adopted a potentially more liberal "just and reasonable" standard to be applied to section 271 network elements, and notes that the section 271 pricing standard is the same as is commonly found in a variety of pre-Act statutes (including sections 201 and 202). Adopting a different pricing *standard*, however, does not change the *process* used to resolve pricing disputes, nor does it modify the division of pricing responsibility contained in the federal Act (which provides that the FCC may

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rather than the speculative attributes of a purely hypothetical network." However, this concern principally relates to how *loop* charges are estimated, not the rates for local switching. The "actual network topology" is already a feature of the TELRIC process for local switching because the number of wire centers (and, therefore, the number and location of switches) is fixed in the TELRIC model.

[21] TRO, ¶ 663, footnotes omitted.

[22] As a practical matter, network elements are predominately used to provide intrastate services (intrastate usage is commonly more than 90%) and, as a result, sections 201 and 202 would almost never govern rates if the traditional separation of regulatory jurisdiction applied.

[23] This is not to say that the FCC would not directly apply 201 and 202 in those instances where it is asked to evaluate a rate. The fact that the FCC has separate authority to review rates under section 271 does not suggest that it has an exclusive (or even primary) responsibility in this regard.

define, through rulemaking, a general methodology – in this instance, by adopting the just and reasonable standard -- while it is the states' responsibility to actually establish the rate).[24] Importantly, the adjudicatory process required by section 271 of the Act is no different than the adjudicatory process required by section 251 of the Act – through the arbitration and approval of interconnection agreements in accordance with section 252.[25]

While there is consensus among industry participants that the RBOCs must offer each of the elements listed in section 271, there is less agreement as to what that actually means and, equally important, exactly how disputes are resolved and by whom. The Act, however, is not uncertain – each section 271 network element must be offered through interconnection agreements that are subject to the section 252 review process.

To begin, section 271(c)(2)(A) clearly links a BOC's duty to satisfy its obligations under the competitive checklist to its providing that access through an interconnection agreement (or SGAT):

> (A) AGREEMENT REQUIRED - A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought--
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> (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [Interconnection Agreement], or
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> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and
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> (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].

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[24] The United States Supreme Court affirmed this division or responsibility in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, at 384 (1999):

> …252(c)(2) entrusts the task of establishing rates to the state commissions. We think this attributes to that task a greater degree of autonomy than the phrase 'establish any rates' necessarily implies. The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

[25] Indeed, we are aware that a number of states (for instance, Tennessee and Georgia) are already addressing the pricing of unbundled local switching being offered under section 271 in arbitrations before those commissions.

As the above makes clear, the specific interconnection obligations of section 271's competitive checklist (item ii above) must be provided pursuant to the "agreements" described in section 271(c)(1)(A) or the SGATs described in section 271(c)(1)(B). By directly referencing section 271(c)(1)(A) and (B), the Act explicitly ties compliance with the competitive checklist to the review process described in section 252. As section 271(c)(1) states:

> (1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.[26]

Thus, whether agreements are reached through ongoing commercial negotiations (which we hope will be the case), or whether just and reasonable terms must be established through regulatory adjudication, the relevant process is that described by section 252 of the Act. Where the parties voluntarily agree, the resulting agreement must be filed; where there is a dispute, the dispute must be arbitrated by the state commission. That is the structure adopted by Congress, with the most important role assigned to the state commissions. Nothing has changed these basic facts – and the processes adopted by Congress are as important today as they were in 1996 when the Act became law.

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[26] Section 271(c)(1)(A), emphasis added. Because a BOC could only comply with the requirements of section 271 through a statement of generally available terms and conditions (SGAT) if it had not received a request for access or interconnection with 10 months of the Act's passage, the remaining discussion focuses solely on the interconnection agreements described in section 271(c)(1)(A).